

Smart Buildings Policy Project
Suite 1200, 888 17th Street NW
Washington, DC 20006

December 5, 2003

VIA ELECTRONIC SUBMISSION

Ex Parte

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: In the Matter of Petition of BellSouth Telecommunications, Inc. For
Forbearance Under 47 U.S.C. 160(c) From Application of Sections 251(c)(3),
(4) and (6) in New-Build, Multi-Premises Developments; WC Docket No. 03-
220**

Dear Ms. Dortch:

The Smart Buildings Policy Project ("SBPP"),¹ a broad-based group supporting reasonable and non-discriminatory access to multi-tenant environments ("MTEs"), strongly opposes BellSouth Telecommunications, Inc.'s (BellSouth's) Petition to forbear pursuant to 47 USC 160(c) from the application of Section 251(c)(3), (4), and (6) in new-build, multi-premises developments.

For the past several years, the SBPP has submitted rounds of comments demonstrating to the Commission that access to MTEs is a fundamental prerequisite to local facilities-based competition and that access to MTEs is constrained by building owners and incumbent providers. In the *First Report and Order* in the Competitive Networks proceeding², the Commission agreed with SBPP (and the majority of commentors) and took steps toward alleviating discriminatory

¹ The SBPP is a coalition of telecommunications carriers, equipment manufacturers, and other organizations that support non-discriminatory telecommunications carrier access to tenants in MTEs. The SBPP was formed after many telecommunications carriers found that building access posed a very serious barrier to facilities-based competition.

² *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, *First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217*, *Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98*, and *Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57*, FCC 00-366 (rel. October 25, 2000) ("*First Report and Order and Further Notice*").

access to MTEs. For example, the Commission prohibited exclusive access arrangements between building owners and carriers in commercial MTEs.³ Additionally, the Commission clarified that where the ILEC exercises control over inside wiring, the ILEC must provide access to such wiring as a UNE at TELRIC prices.⁴ In its most recent decision addressing competitive access to MTEs -- the *Triennial Review Order* -- the Commission expressly acknowledged that “competitive carriers are impaired on a nationwide basis without access to unbundled subloops used to access customers in multiunit premises.”⁵

Indeed, the *Triennial Review Order* accorded substantially greater weight to impairment factors with respect to inside wire subloops than to loops generally and required the unbundling of inside wire subloops of *any* capacity level.

“We recognize that carriers seeking to provide all types of loop capacities to end users in [MTEs] may encounter these impairments on an equal basis. For example, in a building where unbundled DS3 loops from the incumbent LEC are no longer required because such capacity has met the self-provisioning or available wholesale alternative trigger, the availability of such capacity *to* the building does not correlate to the ability to take that capacity *up through the* building.”⁶

Yet, just a few months after the Commission determined that competitive carriers are impaired on a nationwide basis without access to unbundled inside wire subloops, BellSouth requests that the Commission undo this critical aspect of the *Triennial Review Order*⁷ arguing that its Sec. 251(c) obligations prevent it from competitively bidding to install facilities and provide service in new builds. However, nothing could be further from the truth.

In its *First Report and Order*, the Commission found that building owners “retain the ability and incentive to discriminate among and impose unreasonable terms on new entrants.”⁸ In contrast, ILECs stand toe-to-toe with building owners in striking bargains for access to MTEs. First, ILECs often have long-standing relationships with most building owners – likely the same

³ On August 9, 2002, the SBPP submitted an ex parte communication in WT Docket 99-217, *Promotion of Competitive Networks in Local Competition*, setting forth the fact that there are “still pervasive and persistent problem in competitive access” to MTEs and proposing that the FCC adopt a series of principles that would help ensure landlord compliance with the pro-competitive principles of the Telecommunications Act of 1996 and the *First Report and Order* in the Competitive Networks docket.

⁴ *First Report and Order* at ¶ 58.

⁵ *Triennial Review Order* at ¶ 348.

⁶ *Triennial Review Order* at n. 1041.

⁷ Petition at 6.

⁸ *First Report and Order* at ¶ 14.

building owners engaging in new builds. Second, ILECs have historic franchise arrangements, relationships with municipalities, and superior access to rights-of-way. Third, as

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compared to many smaller competitive providers, ILECs enjoy a more ubiquitous brand image, larger market share, and greater financial resources. Indeed, as the Real Access Alliance asserted in its comments: "BellSouth is so dominant in its region, and has such great experience and resources, that it can probably compete effectively even at a disadvantage, especially against relatively small, undercapitalized and inexperienced companies."⁹ As relatively new entrants into the local market, the CLECs lack many, if not all, of these attributes, and they continue to have difficulty negotiating with owners of MTEs.¹⁰

Moreover, even if BellSouth did not possess these substantial competitive advantages, the Commission's rules prevent carriers, including CLECs, from entering into exclusive arrangements with owners of commercial MTEs.¹¹ Thus, a carrier winning a bid to install facilities in new commercial MTEs may not enter into an exclusive access arrangement with the building owner that would bar BellSouth from gaining access. SBPP has urged the Commission to extend this prohibition to include residential MTEs.¹²

In sum, access to MTEs is critical, and without being assured of access, CLECs face significant disadvantages in the market related to network deployment, operational efficiencies, and marketing to and servicing prospective customers. In its *Triennial Review Order*, the Commission again acknowledged this fact. Thus, BellSouth has failed to meet the requirements by which forbearance may be granted. Section 10(d) of the Act requires the local competitive provisions to "have been fully implemented." As described herein, and as recognized by this Commission in the *Triennial Review Order*, competitive access to MTEs is a far cry from "fully implemented."

Sincerely,

Thomas Cohen
Smart Buildings Policy Project

⁹ Comments of the Real Access Alliance in WC 03-220 at 6, Filed November 10, 2003.

¹⁰ See Comments of the Smart Buildings Policy Project in WT Docket No. 99-217, March 8, 2002, pp. 7-21.

¹¹ See 47 C.F.R. §§ 64.2300.

¹² SBPP letter to the FCC on August 9, 2002 at p. 2.